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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 952

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.

Petitioner,

vs.

C. GORDON ANDERSON, TRUSTEE,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

TMT Trailer Ferry, Inc. has been involved in reorganization proceedings since June, 1957. It was insolvent at the time and in spite of substantial earnings under the management of its business by an efficient trustee it has remained insolvent. For this reason its stockholders have been excluded from participation in all of the several

plans of reorganization that have been considered from time to time.

The tally of claims against the debtor in round figures is as follows: (III 224)[1]

U. S. government tax and non-tax claims required to be paid in cash	$1,097,000
Tax claims of other governments	84,000
Preferred ship mortgage covering all five vessels remaining for use by the debtor (Referred to as the Caplan mortgage or the Sheaffer-Spitzer mortgage)	330,000
Lien claims against vessels and equipment	129,000
Claims of general or unsecured creditors	3,796,000
TOTAL	$ 5,436,000

The value of the assets of the debtor was far less than the total of these claims. The book value in June 1962 at the conclusion of a series of valuation hearings was $1,887,185.77 (II 387.1) and the district court found the actual value at the time to be $1,978,481.73. (II 387.2) The success of the trustee in operating the debtor's business resulted in its having a going concern value in excess of the appraised value of its assets, and the district court found this going concern value to be $2,780,000. (II 387.5-387.6) Earnings have declined materially since this finding. They were up to $524,000 in 1962 when the findings were made, but dropped to $403,000 in 1963 and to

[1]References to the records before the court will be the same as those used in the Petition for Writ of Certiorari: III refers to the record in the most recent appeal to the Fifth Circuit, Case No. 22,652. II refers to the record in Fifth Circuit Case No. 19,996. I refers to the record in Fifth Circuit Case No. 18,475.

$200,000 in 1964. (III 77) They have declined even further since 1964.

The insolvency of the debtor is actually greater than is indicated by the above figures. Before stockholders can participate, the creditors must be paid not only the face amounts of their claims as listed above, but also post-bankruptcy interest in full. *In re Inland Gas Corp.* (6th Cir. 1957) 241 F.2d 374 (cert. den. 335 U.S. 838, 2 L.Ed. 2d 50); *Spitzer v. Stichman* (2d Cir. 1960) 278 F.2d 402. Such interest in this case would amount to several million dollars since the proceedings are now in their tenth year.

The strict priority rule prescribed by this court requires *full compensatory treatment* for creditors before stockholders have any equity in the property of a reorganization debtor. *Consolidated Rock Products Co. v. DuBois* (1941) 312 U.S. 512, 85 L.Ed. 982.

These figures illustrating the hopeless insolvency of this debtor are cited because it has been a major contention of the Petitioner (sometimes herein referred to as the Stockholders Committee) throughout the proceedings and now before this court that the debtor can somehow be shown to be solvent. This is to be done by refusing to compromise or settle any claims but instead litigating every possible objection to them, and by suing every person connected with the former management who might be held financially responsible for some part of the debtor's losses.

The problems involved in developing a plan of reorganization for this debtor were inherently difficult. Money was not available to pay in cash as required by law the

large amount of U. S. government claims. Claims secured by mortgages and liens had to be provided for before common creditors could be considered. There was no capital available, except out of the trustee's earnings, for needed replacement of the vessels which were old Navy LSTs declared surplus after World War II.

The plan of reorganization finally evolved (III 247-259) was an "internal" one by which the company is turned over to its common creditors who exchange their claims, pro rata, for all of the new common stock. Governmental preferred creditors are paid in full in cash, and creditors holding liens are paid over a period of time. The plan provides for settlements of two large controversial claims, those of the Caplan mortgage and Merrill-Stevens Drydock and Repair Company. The plan was accepted by an almost unanimous favorable vote of the creditors. (III 316)

The plan was confirmed by the district court in April 1965 (III 328-331) without objection from any creditor. Final consummation of the plan has been delayed pending the appeal by Petitioner to the Circuit Court of Appeals and the outcome of the pending Petition in this court.

Petitioner's Statement of the Case contains many misleading and inaccurate statements implying improper conduct by the trustee. For example on page 9 of the Petition, the statement is made that "the trustee's second plan gave control of the company principally to Merrill-Stevens" . . . The truth is that the initial internal plan, to which the statement refers, was proposed not by the trustee but by a court-appointed committee of attorneys

representing unsecured creditors as a class (II 41-42), and it gave control to *all* such creditors, not to Merrill-Stevens who was only the largest of such creditors.

The statement is also made that the trustee was to have a long-term contract with the reorganized company and assurance of substantial stock options. While such provisions for the trustee were suggested at one time by the creditors, there have never been any such provisions in any of the plans approved by the court. The entire issue with respect to the propriety of the trustee being retained as president and manager of the reorganized debtor was argued and decided in the prior appeal. (Fifth Circuit Case No. 19,996) See *In re TMT Trailer Ferry, Inc.* (1964) 334 F.2d 118. The issue was finalized by that decision and the current plan of reorganization contains the same authorization for the retention of the trustee's management as was approved in the cited case.

ARGUMENT

We will argue the questions presented on pages 2 and 3 of the Petition and in the order listed but will restate them more accurately.

1. All material matters involved in the preparation, approval, acceptance and confirmation of the plan of reorganization were fully heard and considered by the district court and argued and affirmed by the appellate court.

It is apparent from the Petition herein that Petitioner seeks a further review of matters that have been very

thoroughly considered by the district court and whose decisions have been affirmed in two opinions by the appellate court.[2] It is significant that no attack is made on the *procedure* prescribed in the Bankruptcy Act for the preparation, consideration, approval, acceptance and confirmation of a plan of reorganization.

There is no basis in the record for the charge that hearings were not held "on substantial issues going to the essential fairness of the plan." The internal plan of reorganization was the subject of two series of hearings in the district court. The first were in 1962 when hearings were held on April 24-25 (II 42-230), and on May 2 (II 259-300), and on June 19 (II 310.52-356) at which extensive evidence was received with respect to the value of the debtor's assets and business and the fairness and feasibility of the plan of reorganization. Later, when amendments to the plan were being considered, hearings were held on November 4, 1964, (III 21-66), on January 18 & 19, 1965 (III 83-189) and on March 15, 1965. (III 284-308) These hearings resulted in appropriate orders by the district judge passing on the matters sought to be further reviewed here. The findings were based upon *substantial evidence* and should not be disturbed unless *clearly erroneous*. *Spitzer* v. *Stichman*, 278 F.2d 402 (2d Cir. 1960).

It is not specified in the Petition for Writ of Certiorari precisely where and how the District Court erred in making its ultimate findings with respect to the fairness, equitableness and feasibility of the plan of reorganization that was finally evolved after years of effort and

[2]In re TMT Trailer Ferry, Inc. (1964) 334 F.2d 118; Protective Committee etc. v. Anderson (1966) 364 F.2d 936.

controversy. The petition relies on vague charges of conspiracy by creditors and connivance by the trustee in seeking to convince this court that neither of the two lower courts has given the case proper consideration. We do not consider it necessary in this brief to burden the court with a review of all the evidence in this volumnious record which supports the decisions of the trial court and their affirmance by the appellate court.

2. There is nothing in the record to sustain the charges that the trustee is guilty of improper actions that would disqualify him to act as trustee or to become president of the reorganized debtor.

The main thrust of the Petition is an attack upon the motives and integrity of the trustee with the implication that he is personally at fault regarding the failure of the plan of reorganization to make some provision for stockholder participation. It will suffice to answer these charges by pointing out that every action of the trustee has been the subject of thorough consideration and approval by the district court, and that his actions as well as the orders approving them have been reviewed and affirmed twice by the Circuit Court of Appeals.

It is significant that nowhere in the entire proceedings is there any suggestion or motion that the trustee should be removed for improper conduct or affiliations. The trustee was appointed in November 1957 and his actions have been the subject of judicial scrutiny and approval for more than nine years. The Petition herein goes so far as to charge him with protecting defrauding creditors. (P. 21 of Petition) This kind of scandalous

charge is in reality one against the lower courts for it is they who have determined the rights of creditors and not the trustee.

The same can be said of the charge that the trustee is disqualified from being affiliated with the management of the reorganized debtor. All of the trustee's actions in dealing with the creditors who are to own and control TMT upon consummation of the plan were submitted to the district court and approved. It was the creditors who wanted the trustee's services retained because he had been successful in running the business. The only provision in the plan of reorganization on the subject reads:

> "It is necessary that competent management, which might include present management, be employed to operate the reorganized company and that any such management contract is to be approved by the new Board of Directors and the court."

P. 4a, Appendix to the Petiiton.

The Court of Appeals properly upheld this provision and refused to disqualify the trustee.

> 3. All charges of fraud against major creditors were properly investigated in the district court proceedings, and there is no basis for the contention that compromises of major claims against the debtor were improperly approved by the district court.

The charges of fraud against the holders of the Cap-

lan (Shaffer-Spitzer) preferred ship mortgage were the subject of a long and thorough investigation by the trustee whose report to the court is in the record. (I 255-295)

As to the charges filed against the holders of the Merrill-Stevens claim and the objections thereto, the record includes a lengthy report by the trustee explaining the extent of his investigation and why he recommended against litigating the issues. (II 22-26) A hearing was held on the trustee's recommendations (II 35-40) and thereafter negotiations resulted in the unsecured creditors' committee (*not* the trustee) making the initial proposal for an internal plan of reorganization that included the compromise settlement of the Merrill-Stevens claim. (II 41-42) The district court, as pointed out in our Statement of the Case, held many hearings on the plan and its various amendments and expressly approved the Merrill-Stevens compromise. (II 372-373, III 263-264)

Likewise, the trustee eventually on advise of counsel recommended against suing the holders of the Caplan mortgage and proposed the settlement of that claim which is included in the plan of reorganization. (III 250-251)

The Petitioner here, representing the stockholders, has no valid standing to object to these compromises because if the two claims which totaled $1,958,284.40 were *disallowed in toto* the debtor would remain insolvent and there would still be no equity for stockholders. The district court so found in its valuation order. (II 387.6) The creditors are the real parties in interest and it is for their benefit that the reorganization be concluded and not delayed by protracted and expensive litigation.

The approval of a compromise is an exercise of judicial discretion which should not be disturbed unless the court acted arbitrarily or clearly abused its discretion. *Daniel Hamm Drayage Co.* v. *Willson* 178 F.2d 633, 635 (8th Cir. 1949); *Fernow* v. *Gubser*, 136 F.2d 971 (10th Cir. 1943); *In re Prudence Co., Inc.*, 98 F.2d 559 (2d Cir. 1938) cert. den., sub. nom. *Stein* v. *McGrath*, 306 U.S. 636, 83 L.Ed. 1037.

4. The debtor was found to be insolvent, and stockholders thereby excluded from participation, as a result of competent and substantial valuation evidence clearly indicating insolvency.

We have outlined in our Statement of the Case the material facts indicating the insolvency of the debtor.

It will suffice to point out that Petitioner contends the findings of insolvency by the district court are based upon an alleged "inadequate" record of the estimated future earnings of the debtor in determining its going concern value. The inadequacy is asserted to be the failure to anticipate greatly increased earnings under private management. Our position and that of the district court is that it is not proper to speculate on what improvements the future private management of the company might make in the operation of the business, and that is not possible to estimate what effect they might have on future earnings. The only reliable and proper way to determine the going concern value of a successfully operated business such as TMT is to base such value on the record of its present and past earnings, as was done in this case.

This position was fully sustained by the Fifth Circuit Court of Appeals. See pages 10a-13a of the Appendix to the Petition.

5. The district court and the appellate court properly rejected the contention that stockholders are entitled to be treated as creditors of the debtor.

The Supreme Court of Michigan has aptly stated:

> "When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another and, to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion."
>
> *Thompson* v. *American State Bank of Detroit*, 239 N.W. 373, 374. (1931)

As stated in the Petition there were more than 7,000 stockholders of the debtor. It is significant that only one of them filed a claim seeking treatment as a creditor, Irma S. Mason, attorney wife of Malcolm S. Mason who in the district court and in the appellate court was one of the attorneys representing the Petitioner.

The Mason claim (II 358-363) sought to recover from the debtor what had been paid *on the open market* for TMT stock more than nine months before the reorganization proceedings began. *Rescission of the purchase* is sought and the *debtor* held liable for the cost of the stock because of an alleged *conspiracy* between the debtor and

its financial advisors which resulted in the market being flooded with "illegally issued stock" of which the Mason stock was "probably" a part.

The claim was not timely filed and the district court held it to be without merit for that reason and also because the facts relied on failed to show that stockholders either as a class or individually could assert claims as creditors. (Page 9a of Appendix to Petition)

It can not be properly contended here that the decisions of the district court and of the appellate court in refusing to consider stockholder rescission claims were clearly erroneous.

CONCLUSION

Petitioner seeks a complete review by this court of all the facts and circumstances surrounding this debtor which were material to the forming of the plan of reorganization. The Petition does not indicate any special and important reasons why this court should revalue the equities of the plan in view of the thorough consideration given them by the district court and the circuit court of appeals.

It is important that these proceedings be concluded without further delay. It will soon be ten years since they began. There is no assurance that a re-trial of any of the issues would result in any benefit to the stockholders, while the creditors are being harmed by any more postponement of an opportunity to recover some of their losses.

We respectfully urge that the Petition for Writ of Certiorari be denied.

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Dated: January 26, 1967.